

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA ALLEN WILSON,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 261897

Ingham Circuit Court

LC No. 04-000439-FH

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of one felony count of first-degree home invasion, MCL 750.110a(2)(b). Defendant was tried jointly with his brother Jeremy Lee Wilson.¹ Defendant was sentenced by the circuit court to a prison term of 30 months to 240 months. We affirm.

This case arose when the victims, Tracy and James Root, returned to their home shortly after having departed for work because Tracy was feeling unwell and James had forgotten his identification card. Tracy arrived first and discovered lights on, defendant and Jeremy in the spare bedroom, and two other men in the Roots' bedroom. Jeremy and defendant immediately ran away, while the Roots fought with the other two intruders, both of whom also escaped. The Roots called 911. The Roots testified that they were immediately certain of Jeremy's and defendant's identities, but they did not immediately disclose those identities to the police because Jeremy was James' marijuana dealer, and the Roots were afraid that James might lose his employment if his drug use was discovered. The Roots identified Jeremy and defendant after the police assured them that James' employer would not be contacted.

Defendant first argues that he was denied a fair trial by the trial court's decision to join his trial with that of his brother. We disagree.

¹ Where necessary, we will refer to Jeremy Lee Wilson as "Jeremy." Jeremy does not have an appeal pending at this time.

The decision to sever or join defendants lies within the discretion of the trial court. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).² Absent a showing that a defendant's substantial rights were prejudiced and that severance was necessary, we will not interfere with the trial court's discretion. *Id.*, 355. Defendant contends that his identification is questionable because he and Jeremy are twins. However, the record clearly shows that they are not identical twins and do not look alike, and Tracy and James each testified that they saw both twins at the break-in. If both defendant and his brother were visible to the Roots, the hypothesis that they mistook one for the other does not hold. Defendant also contends that he was prejudiced by evidence that Jeremy had regularly sold marijuana to the victims. Defendant does not dispute that this evidence was properly admitted against Jeremy and only for the purpose of establishing the Roots' ability to positively identify him. The jurors were specifically instructed that they "should consider each defendant separately. Each is entitled to have his case decided on the evidence and the law that applies to him." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We see nothing in the record to suggest that the jurors likely drew an improper conclusion and convicted defendant based on the bad character of his brother.

Defendant next argues that he is entitled to a new trial because newly discovered evidence corroborates the alibi defense he raised at trial. We disagree.

We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). "For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Cress, supra* at 692 (quotation marks and citations omitted).

Defendant argued at trial that he could not have been involved in the home invasion in Lansing on September 18, 2003, because he was at his fiancée's cousin's home in Rothbury, Michigan during the relevant time. However, the cousin testified for the prosecution as a rebuttal witness that defendant and his fiancée were in Lansing visiting his family from September 13 to September 30, and they were not at her home or elsewhere in Rothbury. Defendant now argues that he was working in Grand Rapids the evening of the home invasion, and as evidence of this provides affidavits signed and sworn to by the owners of the company for which he worked at the time of the break-in. Defendant's trial counsel and his trial counsel's legal secretary provided affidavits that clearly show counsel was aware prior to trial of defendant's claim that he was working at the time of the home invasion. They suggest that counsel was having difficulty obtaining the information proving it, but not that counsel was unable to call on the court's resources, such as the issuance of subpoenas, to help. We therefore conclude that defendant is unable to satisfy the first and third requirements of the *Cress* test.

² Amended on rehearing on other grounds 447 Mich 1203 (1994).

Finally, we reject defendant's argument that he is entitled to a new trial because of prosecutorial misconduct. We review de novo claims of prosecutorial misconduct, *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), examining the remarks in context to determine whether defendant received a fair and impartial trial, *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003).

Defendant's argument that the prosecutor acted improperly by calling defendant and his witnesses liars is without merit. In *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1998), we observed that while a prosecutor may not vouch for the credibility of a witness or suggest that the government has some special knowledge that the witness is lying, the prosecutor may "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *Id.* As in *Howard*, the prosecutor in the case here used the terms "liar" and "lying" when characterizing the credibility of the witness' testimony in comparison to contradictory testimony adduced at trial. Further, nothing in any of the cited comments amounts to an assertion, either express or implied, that the prosecutor has special knowledge of the truthfulness of the witnesses. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Indeed, the prosecutor specifically stated that it was the jury's job to assess credibility.

Defendant also argues that the prosecutor engaged in misconduct when he suggested during cross-examination of defendant that he was involved in his brother's marijuana trade:

Q. Your brother called you on September 17th, 2003, to deliver some marijuana down in Lansing, didn't he?

A. No.

Q. And you did come to Lansing to deliver that marijuana to the Roots, correct?

A. No.

Q. All right. Why would your brother tell the cops that then?

A. I'm not sure.

Q. So your testimony is you never brought marijuana for your brother to the Roots?

At this point, both defendants' attorneys objected to the prosecutor's questions, which the court sustained. Defendant argues that these questions irrevocably prejudiced him in the minds of the jury, and that a curative instruction asking the jury to ignore the prosecutor's questions would not have remedied the situation.

We agree that the questions improperly introduced matters not in evidence; specifically, an alleged statement by Jeremy to the police. However, the jury was instructed that only answers, and not questions, are evidence, and that the jury "should only accept things the lawyers say that are supported by the evidence." Further, defendant was on trial for his role in the home invasion, not drug dealing, and the court clearly instructed the jury on the elements of the crime

charged. Again, jurors “are presumed to follow their instructions,” *Graves, supra* at 486, and we perceive no indication that they did not do so here.

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Alton T. Davis